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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA  
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10 JOHN PEEK,

11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA,

14 Defendant.

CASE NO. 3:17-cv-5951 RJB

ORDER ON MOTION TO  
DISMISS FOR LACK OF  
SUBJECT MATTER  
JURISDICTION

15 This matter comes before the Court on the United States' Motion to Dismiss Plaintiff's  
16 Amended Complaint. Dkt. 12. The Court has considered the pleadings filed regarding the  
17 motion and remaining record, and is fully advised.

18 On November 17, 2017, Plaintiff filed this case asserting negligence claims under the  
19 Federal Torts Claims Act, 28 U.S.C. § 2671 *et. seq.*, ("FTCA"). Dkt. 1. Defendant now moves  
20 to dismiss pursuant to Fed. R. Civ. P. 12 (b)(1), arguing that this Court is divested of jurisdiction  
21 to consider Plaintiff's claims pursuant to the Veterans' Judicial Review Act, 38 U.S.C. § 511.  
22 Dkt. 12. For the reasons provided below, the Motion (Dkt. 12) should be granted, in part, and  
23 denied, in part.  
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1                                   **I.       FACTS AND PROCEDURAL HISTORY**

2           According to the First Amended Complaint, in the spring of 2013, Plaintiff was treated  
3 by doctors at the U.S. Department of Veterans Affairs (“VA”) for a right foot ulcer. Dkt. 10.  
4 Due to his inability to care for himself and stay off his feet, on May 3, 2013, Plaintiff’s VA foot  
5 doctor recommended that he be admitted to a VA Community Living Center (“CLC”). *Id.*, at 2.  
6 The request for admission was denied. *Id.*

7           On the advice, recommendation and request of his VA foot doctor, Plaintiff again applied  
8 to be admitted to the CLC on May 13, 2013. *Id.* The request for admission to the CLC was  
9 denied. *Id.*

10          Wound care for Plaintiff’s foot ulcer continued. *Id.*, at 3. In August of 2013, Plaintiff  
11 developed a left foot ulcer. *Id.* A third request for admission to the CLC was made and denied.  
12 By August 23, 2013, both foot ulcers were worse. *Id.*

13          On the advice, recommendation and request of his VA foot doctor, Plaintiff again applied  
14 to be admitted to the CLC on September 10, 2013, which was denied. *Id.* He was finally  
15 admitted to the CLC in early October 2013. *Id.*

16          On November 7, 2013, a radiograph was taken, which revealed a bone infection. *Id.* On  
17 January 13, 2014, Plaintiff’s left leg was amputated below the knee. *Id.* On February 14, 2014,  
18 his right foot’s first metatarsal head was removed. *Id.*

19          Plaintiff’s Amended Complaint asserts that:

20          The VA was negligent in one or more of the following particulars:

- 21          (a) Failing to follow the advice, recommendations, orders and requests of Plaintiff’s  
22             treating foot doctor and healthcare provider to place [Plaintiff] in a setting where  
23             he would be able to stay off of his feet;  
24          (b) Failing to adequately and appropriately treat [Plaintiff] for his foot ulcers;

1 (c) Failing to adequately and appropriately treat [Plaintiff] for his developing bone  
2 infections;

3 (d) Placing or allowing Plaintiff to be placed in a clinic setting knowing or having  
4 reason to know that the condition of his feed was likely to worsen due to his co-  
morbidity including but not limited to skin ulcerations and diabetes.

5 Dkt. 10, at 3-4. Plaintiff seeks damages not to exceed \$5,000,000, an award of costs, and  
6 prejudgment interest. *Id.*

7 Defendant now moves to dismiss this case, arguing that Veterans' Judicial Review Act, 38  
8 U.S.C. § 511 deprives this Court of subject matter jurisdiction to consider Plaintiff's FTCA  
9 claims because they all relate to the VA's decision to provide Plaintiff benefits. Dkt. 12.  
10 Defendant asserts that the proper avenue to challenge the VA's decisions on the provision of  
11 benefits is through the Board of Veterans' Appeals. *Id.*

12 Plaintiff responds and asserts that he is making "negligent *treatment*" claims, and is not  
13 challenging the VA's decision on the provision of benefits. Dkt. 18, at 2 (*emphasis in original*).  
14 If the Court does find that all his claims relate to the provision of benefits, Plaintiff moves the  
15 Court to transfer the case to Board of Veterans' Appeals pursuant to 28 U.S.C. § 1631. *Id.*  
16 Plaintiff expresses concern about the statute of limitations. *Id.*

17 Defendant replies and argues the case must be dismissed because all factual allegations relate  
18 to the decision to deny Plaintiff a benefit – admission to the CLC, and so must be dismissed.  
19 Dkt. 19. Defendant asserts that § 1631 allows this court to transfer the case to other "courts," as  
20 defined in 28 U.S.C. § 610 and so does not include administrative agencies, like the VA and its  
21 Board of Veterans' Appeals. *Id.* Defendant further notes that Plaintiff did not allege in his  
22 Amended Complaint that he filed a Notice of Disagreement with the VA within one year of the  
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1 contested decision. *Id.* Defendant asserts that Plaintiff could not maintain a claim with the Board  
2 of Veterans' Appeals because of his failure to file a timely Notice of Disagreement. *Id.*

## 3 **II. DISCUSSION**

### 4 **A. STANDARD ON MOTION TO DISMISS**

5 Under Fed. R. Civ. P. 12 (b)(1), a complaint must be dismissed if, considering the factual  
6 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the  
7 Constitution, laws, or treaties of the United States, or does not fall within one of the other  
8 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or  
9 controversy within the meaning of the Constitution; or (3) is not one described by any  
10 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*  
11 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal  
12 question jurisdiction) and 1346 (United States as a defendant). A federal court is presumed to  
13 lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v. Guardian Life*  
14 *Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d  
15 1221, 1225 (9<sup>th</sup> Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of  
16 subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l*  
17 *Tel & Elect. Corp.*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979).

### 18 **B. FTCA, VETERAN'S JUDICIAL REVIEW ACT, AND JURISDICTION**

19 The United States, as sovereign, is immune from suit unless it consents to be sued. *See*  
20 *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107  
21 (9<sup>th</sup> Cir. 1995). If a claim does not fall squarely within the strict terms of a waiver of sovereign  
22 immunity, a district court is without subject matter jurisdiction. *See, e.g., Mundy v. United States*,  
23 983 F.2d 950, 952 (9<sup>th</sup> Cir. 1993). The FTCA, the statute upon which this case is brought, is a  
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1 limited waiver of sovereign immunity. *See* 28 U.S.C. § 1346 (b). The FTCA is the exclusive  
2 remedy for state law torts committed by federal employees within the scope of their  
3 employment. 28 U.S.C. § 2679 (b)(1).

4 Defendant argues that the Veteran’s Judicial Review Act divests this Court of jurisdiction  
5 to consider Plaintiff’s FTCA claims, citing 38 U.S.C. § 511. Dkt. 12. Section 511 provides that:

6 The Secretary shall decide all questions of law and fact necessary to a decision by  
7 the Secretary under a law that affects the provision of benefits by the Secretary to  
8 veterans or the dependents or survivors of veterans. Subject to subsection (b), the  
9 decision of the Secretary as to any such question shall be final and conclusive and  
10 may not be reviewed by any other official or by any court, whether by an action in  
11 the nature of mandamus or otherwise.

12 Accordingly, the Veteran’s Judicial Review Act precludes federal court jurisdiction over “cases  
13 where adjudicating veterans’ claims requires the district court to determine whether the VA acted  
14 properly in handling a veteran’s request for benefits” and “also to those decisions that may affect  
15 such cases.” *Veterans for Common Sense v. Shinseki*, 678 F.3d. 1013, 1023-26 (9th Cir. 2012).

16 To the extent that Plaintiff makes claims that the VA improperly denied his request for  
17 admission into the CLC, this was a denial of benefits, and so those claims should be dismissed  
18 pursuant to the Veteran’s Judicial Review Act. Further, to the extent that Plaintiff’s claims  
19 would require a decision that may affect the VA’s handling of Plaintiff’s request for benefits, his  
20 claims should also be dismissed.

21 Plaintiff asserts in his Amended Complaint that the Defendant was negligent, in part, for:  
22 “[f]ailing to adequately and appropriately treat [Plaintiff] for his foot ulcers . . . [and] for his  
23 developing bone infections.” Dkt. 10, at 3-4. To the extent Plaintiff makes a negligence claim  
24 for medical treatment unrelated to the decision to deny him benefits (that is the denial of  
admission to the CLC), there is no assertion that this Court lacks jurisdiction for those claims,  
and the motion to dismiss, based on lack of jurisdiction, should be denied.

1 In its reply, Defendant argues that Plaintiff fails to plead any facts in support of an  
2 allegation that he received negligent medical treatment. Dkt. 19. This argument appears for the  
3 first time in Defendant's reply and should not be considered. *Zamani v. Carnes*, 491 F.3d 990,  
4 997 (9th Cir. 2007)(holding "district courts need not consider arguments raised for the first time  
5 in a reply brief"). Even if it were properly raised as a Rule 12 (b)(6) motion, Plaintiff may well  
6 be entitled to amend his Amended Complaint to plead facts in support of that claims. *See*  
7 *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017)("In dismissing for failure to state a claim,  
8 a district court should grant leave to amend even if no request to amend the pleading was made,  
9 unless it determines that the pleading could not possibly be cured by the allegation of other  
10 facts").

### 11 C. TRANSFER

12 If Defendant's motion to dismiss is granted, Plaintiff moves the Court for an order of transfer  
13 to the Board of Veterans' Appeals pursuant to 28 U.S.C. § 1631. Dkt. 18. Plaintiff's motion for  
14 a transfer should be denied.

15 Under 28 U.S.C. § 1631,

16 Whenever a civil action is filed in a court as defined in section 610 of this title or  
17 an appeal, including a petition for review of administrative action, is noticed for  
18 or filed with such a court and that court finds that there is a want of jurisdiction,  
19 the court shall, if it is in the interest of justice, transfer such action or appeal to  
20 any other such court in which the action or appeal could have been brought at the  
21 time it was filed or noticed, and the action or appeal shall proceed as if it had been  
22 filed in or noticed for the court to which it is transferred on the date upon which it  
23 was actually filed in or noticed for the court from which it is transferred.

24 Pursuant to 28 U.S.C. § 610 defines "courts" to include: "the courts of appeals and district  
courts of the United States, the United States District Court for the District of the Canal Zone,  
the District Court of Guam, the District Court of the Virgin Islands, the United States Court of  
Federal Claims, and the Court of International Trade." Accordingly, 28 U.S.C. § 1631 "provides

1 for the transfer of actions only between federal courts.” *See Hadley v. Hawaii Gov’t Employees’*  
2 *Ass’n*, 281 Fed. Appx. 683, 684 (9th Cir. 2008). “The Board of Veterans’ Appeals is an  
3 administrative agency within the Department of Veterans Affairs, and 28 U.S.C. § 1631 does not  
4 permit transfer from this Court (or any court) to an administrative agency.” *See Jackson v.*  
5 *United States*, 80 Fed. Cl. 560, 566 (Fed. Cl. 2008). Plaintiff fails to point to any other authority  
6 to transfer his claims. The motion to transfer (Dkt. 18) should be denied.

### 7 **III. ORDER**

8 It is **ORDERED** that:

- 9 • Defendant’s Motion to Dismiss Plaintiff’s Amended Complaint (Dkt. 12) **IS:**
- 10 ○ **GRANTED** to the extent that Plaintiff makes claims that the VA improperly  
11 denied his request for admission into the CLC or makes claims that may affect the  
12 VA’s handling of Plaintiff’s request to be admitted to the CLC; and
- 13 ○ **DENIED** to the extent Plaintiff makes a negligence claim for medical treatment  
14 unrelated to the decision to deny him benefits (that is the denial of admission to  
15 the CLC); and
- 16 • Plaintiff’s motion to transfer the case to the Board of Veterans’ Appeals (Dkt. 18) **IS**  
17 **DENIED.**

18 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
19 to any party appearing *pro se* at said party’s last known address.

20 Dated this 24<sup>th</sup> day of April, 2018.

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22 ROBERT J. BRYAN  
23 United States District Judge  
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